

WATER COUNCIL MEETING

Dept. of Environmental Services
29 Hazen Dr., Concord, N.H.

January 14, 2004
9:00 a.m.

Members present: Councilors Bridges, Bradley, Butler, Densberger, DiMarzio, Funk, Ingham, Lyons, and Varotsis

Members absent: Councilors Cowan, Patenaude and Phillips; Councilor Flynn or his designee, David Barrett; Councilor Stephen or his designee, Brook Dupee; Councilor Manoogian or her designee, Ben Frost

Vacancies: Appointee representing agricultural interests

Chairman Bridges opened the meeting at approximately 9:00 a.m.

1. Approval of Minutes of December 10, 2003 Meeting

A motion was made by Councilor Bradley to accept the minutes of the December 10, 2003 meeting. The motion was seconded by Councilor Funk and it was unanimously voted.

2. Appeals Update

Michael Sclafani distributed an Appeals Status Report and reviewed the report with the Council.

- **Docket No. 03-09 WC - Appeal of Town of Chester Conservation Com.**

An appeal hearing is scheduled for February 11, 2004 at 10:00 a.m.

- **Docket No. 03-10 WC - Appeal of Conservation Law Foundation**

Attorney Jennifer Patterson of the Attorney General's Office, representing DES, presented a report on the status of this appeal. Attorney Patterson stated that the parties have agreed to request that the Council continue the stay which was granted on November 4, 2003 pending a decision by DES on a Wetlands application, which the Department expects to issue by January 30, 2004. The parties further agreed that once they have had an opportunity to review the decision, the stay should be lifted and a pre-hearing conference scheduled.

Councilor Butler made a motion to continue the stay. Councilor Varotsis seconded the motion and it was unanimously voted.

- **Docket No. 03-12 WC - Appeal of USA Springs Inc.**

The parties to the appeal were requested to appear before the Council on January 14, 2004 to present a status report. On January 13, 2004, Mr. Sclafani received a fax transmittal from Attorney Hyatt who represents the appellant, USA Springs, indicating that the appellant considers the appeal moot because it is based upon an application that is no longer pending. Mr. Sclafani contacted Mr. Hyatt to advise him that according to council rules filings cannot be accepted by fax and requested that the appellant file a withdrawal of its appeal with the Council by mail or hand delivery.

Attorney Richard Head, who represents DES, stated that the permit upon which this appeal is based was denied by DES on December 11, 2003 and the time for USA Springs to appeal the denial has expired. USA Springs has filed a new preliminary application with DES. Separate appeals of the December 11, 2003 DES decision have been filed by the Towns of Nottingham and Barrington.

Councilor Varotsis made a motion to table further action on this appeal pending receipt of a formal withdrawal of the appeal from the appellant. Councilor Bradley seconded the motion and it was unanimously voted.

- **Docket No. 03-14 WC - Appeal of Gerald A. Bell**

On December 11, 2003, Attorney Jennifer Patterson from the Attorney General's Office filed an appearance on behalf of DES. On December 30, 2003, the appellant filed with the Council a Notice of Filing of Declaratory Judgment Action indicating that a Petition for Declaratory Relief had been filed with the Merrimack County Superior Court. On December 31, 2003, an Assented-to Motion to Stay was filed with the Council by Attorney Patterson to stay all proceedings before the Water Council until such time as the issues raised in the Declaratory Judgment action have been resolved. A Decision & Order was issued on January 6, 2004 granting the Assented-to Motion to Stay and ordering the parties to appear before the Council at its April 4, 2004 meeting to present a status report.

- **Docket No. 03-15 WC - Appeal of Lamprey Suburban, Inc.**

On December 15, 2003 Attorney Jennifer Patterson of the Attorney General's Office filed an appearance on behalf of DES. Vice Chairman DiMarzio presided over a pre-hearing conference on January 5, 2004 at which the parties reached an agreement in principle. Mr. Sclafani was advised on January 7, 2004 that the agreement has been finalized and a withdrawal will be filed.

- **Docket No. 03-19 WC - Appeal of Pennichuck Brook Watershed Council**

Pursuant to Council's vote on December 10, 2003, a Decision & Order was issued on December 11, 2003 summarily dismissing the Notice of Appeal as not timely filed and denying appellant's Motion to Waive Administrative Rules. On December 12 the applicant, Rais-Crest, LLC, filed an Objection to Request for Extension of Time (Waiver of Rules) and Motion to Dismiss. On January 8, 2004 Pennichuck Brook Watershed Council filed a Motion for Rehearing, and the applicant, Rais-Crest, LLC, filed an Objection to Motion for Rehearing on January 13, 2004. The Objection was distributed to Council members this date. After discussion the following vote ensued:

Councilor Funk made a motion to table a decision on the appellant's Motion for Rehearing until the Council's February meeting. Councilor Ingham seconded the motion. The motion carried with Councilors Butler, Bradley and DiMarzio opposed.

Docket No. 03-20 WC - Appeal of Governor's Island Club Inc.

This is an appeal of a denial of a Comprehensive Shoreland Protection Act request for variance. On December 18, 2003 a Notice of Appeal and Request for Waiver of Rules Relative to Time for Filing Appeal was filed with the Water Council. The Notice of Appeal was not timely filed. The appellant had previously requested reconsideration of the denial from DES rather than filing an appeal with the Water Council. On January 8, 2004 an Abutter's Objection to Notice of Appeal was filed. Attorney Brouillard, on behalf of the appellant, filed an Appearance and Answer to Objection to Notice of Appeal and Request for Waiver of Rules on January 13, 2004.

Councilor Varotsis made a motion to dismiss the Notice of Appeal as it was not timely filed. Councilor Funk seconded the motion and it was unanimously voted.

- **Docket No. 04-01 WC - Appeal of Town of Nottingham**

This is an appeal of the December 11, 2003 findings by DES in its final decision denying USA Springs' application for a large groundwater withdrawal permit. The appeal was timely filed on January 9, 2004.

Councilor Butler made a motion to accept the Notice of Appeal. Councilor DiMarzio seconded the motion and it was unanimously voted.

A pre-hearing conference will be scheduled.

- **Docket No. 04-02 WC - Appeal of Town of Barrington**

This is an appeal of the December 11, 2003 findings by DES in its final decision denying USA Springs' application for a large groundwater withdrawal permit. The appeal was filed on January 12, 2004 and was timely filed.

Councilor Bradley moved to accept the Notice of Appeal. Councilor Butler seconded the motion and it was unanimously voted.

It was suggested by Councilor Bradley that the Appeals of the Town of Barrington and Nottingham be combined for a pre-hearing conference.

Attorney Mark Beliveau, representing the Town of Barrington, was recognized by Chairman Bridges. Attorney Beliveau commented that even if a withdrawal of the Appeal of USA Springs is filed, the issues set forth in the Appeals of the Towns of Barrington and Nottingham will not become moot and that a pre-hearing conference should be scheduled.

Attorney Richard Head, representing DES, indicated that DES disagrees with Attorney Beliveau's position since the application that the appeal was based on is no longer active and that a Motion to Dismiss will likely be filed.

3. Other Business

- **Legislation**

Russ Nylander, P.E. briefly reviewed upcoming legislation, which is a lighter session for DES than the previous two. Copies of Senate Bills and a few letters

of testimony were distributed. Significant proposals include a bill which would establish a fee on bottled water and a constitutional amendment adding language authorizing the General Court to tax water and gravel extracted from the resources of the state in addition to timber.

Councilor Funk requested information about proposed legislation that would prohibit municipalities from establishing wider setbacks than the state requires. Harry Stewart, Water Division Director, explained that there are three wetlands bills being heard, one of which prohibits a municipality from setting more stringent setbacks than the state. Some municipalities, particularly on the seacoast, have setback distances which are more stringent than DES requirements or federal requirements.

- Annual Report

The 2003 Annual Report of the Water Council was distributed for approval of the members before submission to the Governor and Executive Council.

Councilor Butler made a motion to accept the report as written.

Councilor Bradley seconded the motion and it was unanimously voted.

- Sediment Policy

Councilor Butler requested an update on the proposed sediment policy. Harry Stewart stated that a draft policy has been circulated and the concerns expressed were that (1) the state authority for the policy and the federal authority are ambiguous, and (2) it is unclear when the protocol would apply. DES has sent the protocol along with a request for legal ruling on the authority question to the Attorney General for comment. Mr. Stewart will ask Paul Currier, Watershed Bureau Administrator, to make a full presentation to the Council at its next meeting.

- Instream Flow Rules

Harry Stewart explained that the instream flow rules for the Souhegan and Lamprey are in effect. The rules establish a protocol to ascertain the protected instream flow for those rivers and to develop management plans. A request for proposal to conduct the studies has been sent to several firms and the selection process will begin shortly. It is assumed that general fund monies will be available for the studies. Paul Currier will be asked to update the Council at its next meeting.

- Dam Removal

There was discussion regarding the removal of a dam on the Contoocook River in Henniker, which is supported by the Town of Henniker. Councilor Densberger suggested that Stephanie Lindloff of the DES Dam Bureau be invited to make a presentation to the Council regarding the pros and cons of dam removal.

(6) Next Meeting

The next meeting will be February 11, 2004.

(7) Adjournment

The meeting adjourned at approximately 10:30.